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Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RACHAEL V. SANTOS,
Petitioner,

v.

JOHN E. POTTER, Postmaster General,
Respondent,

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Rachael V. Santos
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Petitioner, In Pro Se

28pp

QUESTIONS PRESENTED

1. Can an Administrative EEOC Order that ordered Reasonable Accommodation and did not specify "suitability" be ignored by the District Court and Ninth Circuit who failed to follow it's own Circuit case law on Administrative Orders, as well as other Circuits such as the Eleventh Circuit?

2. May Government agencies, such as the United States Postal Service fail to follow their own rules and regulations?

PARTIES TO THE PROCEEDING

Petitioner

Rachael V. Santos, Petitioner In Pro Se is the only party seeking review of the Ninth Circuit Court of Appeals Memorandum and denial for Rehearing Order and the U.S. District Court Summary Judgment Order. The caption of this Petition for Writ of Certiorari reflects all parties to the proceeding.

Respondent

John E. Potter, Postmaster General of the United States in his official capacity is the only respondent party.

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PETITION FOR WRIT OF CERTIORARI

May it please the Court, to the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:
Petitioner Rachael V. Santos, In Pro Se, requests that a Writ of Certiorari be issued to review the District Court's summary judgment and to review the Order and Memorandum of the United States Court of Appeals for the Ninth Circuit in this case.

Petitioner, requests this Court to grant review on Writ of Certiorari, on the legal questions presented based on Supreme Court Rule 10.1 (a) and applicable federal regulations and case law that require that district courts to enforce final EEOC decisions favorable to federal employees when requested to do so, such as in this case at bar. Petitioner requests the Supreme Court to revisit and reaffirm it's case law that holds that regulations validly prescribed by a government administrator are binding upon him as well as the citizen and that this principle holds even when the administrative action under review is discretionary in nature.

NOT PUBLISHED OPINIONS

The District Court Order and Summary Judgment Civil No.: 95-1678 is not published, see (Appendix C]

The United States Court of Appeals for the Ninth Circuit, Order and Memorandum are not published, see (Appendix A, B]

Petitioner will submit under separate cover portions of the excerpts of record, if the court requests.

STATEMENT OF JURISDICTION

The District Court Order was issued on 10/7/99 and a Notice of Appeal was filed on 10/25/99. The Ninth Circuit Appeal was argued and Submitted on March 8, 2001 and a Memorandum was filed on May 3, 2001. An extension of time was granted to file a Petition for Rehearing, which was filed on June 25, 2001. The Ninth Circuit Court issued an Order Denying Appellant's petition for rehearing on July 30, 2001. On October 10, 2001, petitioner filed application to the Supreme Court for an extension of time within which to file a petition for a writ of certiorari. The application was presented to Justice O'Connor who granted and extended the time to November 28, 2001.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATUES AND REGULATIONS INVOLVED

5 U.S.C. 701 et seq. Administrative Procedure Act and 28 U.S.C. 1361, the Mandamus Statue Subsection 717 of Title VII and subsection 505 of the Rehabilitation Act.
29 C.F.R. 1614.503(g)
29 C.F.R. 1614.504, EEOC Compliance provisions.
29 C.F.R. 1613.217 (b)
29 C.F.R. 1613.218(a) and (g)
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29 C.F.R. 1613.231(a)
29 C.F.R. 1613.234
29 C.F.R. 1613.235(a)
U.S. Department of Labor, Employment Standards Administration, Office of Workers Compensation, Federal Employees Compensation Action Procedures Manual FECA PM Chapter 2-0804 section 4

20 C.F.R. Sections 10.516-7

STATEMENT OF THE CASE

Petitioner is a 30 year employee of the United States Postal Service who sustained an on the job injury/assault, that was accepted and approved by the U.S. Department of Labor in 1985. An EEOC Administrative case arose that led to several orders that were in petitioners favor, and a petition for reconsideration was made to the Office of Federal Operations at EEOC, which was denied in part, but the original order was affirmed in petitioner's favor. Only one EEOC reasonable accommodation case was petitioned for enforcement before the District Court in the 2nd amended complaint. The other three EEOC administrative cases had not had a formal hearing and petitioner suggested to the court and respondent to remand said cases back to the EEOC.

The U.S. Postal Service refused to comply to all said reasonable accommodation EEOC orders and Petitioner requested the U.S. District Court to grant a Petition for Enforcement of an EEOC Administrative Order or in alternative partial summary judgment that was denied in spite of the Melvin Buckingham case that had similar facts as petitioner, such as the issue of a transfer out of the local commute and a different appointing authority and seeking reasonable accommodation.
- Petitioner exhausted well over ten years in the EEOC lengthy administrative process and at the end could not get agency compliance.

The U.S Department of Labor OWCP Branch of Hearings and Review issued an order that specified that the job offer made by the agency was not suitable. Petitioner's physician and the USPS

doctors, as well as Department of Labor physicians, agreed that return to work in a stressful and hostile work environment would endanger petitioner's health and mental well-being. Most importantly the Agency failed to check with petitioner's treating physician prior to making a job offer, as ordered by the EEOC. The EEOC ALJ, Christine Siegel stated in the findings and conclusions of the hearing that she found that the USPS agency had Discriminated against plaintiff based on disability and reprisal by failing to make a reasonable attempt to accommodate plaintiff's disabilitiy. The ALJ further stated that she found that the USPS agency had done everything possible to prevent petitioner from getting back to work and found the agency unworthy of belief.

Respondent was granted summary judgment by the District Court and the Ninth Circuit affirmed. Petitioner requests the Supreme Court to review the conflict of case law with other circuits and the misapplication of law by Respondent and the District and Appeals Court.

ARGUMENT 1

PETITIONER'S 1987 REASONABLE ACCOMMODATION CLAIM WAS ENTITLED TO SEEK ENFORCEMENT OF THE PRIOR EEOC ORDERS OF MARCH 16, 1994 AND JANUARY 23, 1995 WITHOUT RISKING DE NOVO REVIEW OR WAIVING HER ENFORCEMENT RIGHTS

On February 19, 1987 plaintiff filed an EEO complaint alleging unlawful denial of reasonable accommodation under the Rehabilition Act of 1973 And unlawful retaliation pursuant to Title VII of the Civil Rights Act of 1964. On January 23, 1991 the

agency rejected plaintiff's complaint on the grounds that FECA was the exclusive remedy and issued a final agency decision. Plaintiff appealed to the EEOC, which found that FECA benefits were not plaintiff's exclusive remedy, and remanded the case back to the agency for a supplemental investigation.

On June 7, 1991, the agency offered plaintiff a job offer/position in the Alhambra Mail Facility the very location where she was injured and assaulted and the person who caused said injury continued to work at said facility. This was the agency's first failed attempt at a reasonable accommodation.

On June 20, 1991, plaintiff's physician informed the agency that the assignment was not within her medical restrictions and noted the person that caused the injury continued to work at that facility. The Department of Labor deemed the assignment invalid.

Under the USPS 1993restructure program, many employees were involuntary transferred to other districts. It was within the agency's own power to transfer plaintiff to another division. As of May 5, 1993, numerous vacant positions were available within plaintiff's local commute including the Los Angeles, Long Beach and Van Nuys Divisions. The agency adopted EEOC ALJ Siegel's findings of discrimination but modified the recommended corrective action by stating that it would accommodate plaintiff by reassigning her within the Santa Ana Division only.

On June 28, 1993 plaintiff appealed the agency decision. In October 1993, respondent offered petitioner a position in the Beverly Hills Post Office, located in the Long Beach Division. On December 1, 1993 petitioner rejected this offer because it did not

meet her medical restrictions. The OWCP found that respondent's 1993 Beverly Hills job offer was not "an offer of suitable employment". On March 16, 1994, the EEOC ordered respondent to offer petitioner an appropriate position within her medical restrictions. Respondent was ordered to contact petitioner's attending physician, prior to tendering such an offer, to ascertain with certainty the nature of her medical restrictions at that time. On January 23, 1995, the EEOC reaffirmed its earlier decision and ordered respondent to offer an appropriate job within petitioner's medical restrictions. Respondent refused to communicate with petitioner's attending physician. Respondent responded by re-offering petitioner the same position in the Beverly Hills Post Office. Petitioner rejected this offer. On February 17, 1995, respondent again offered the same position in Beverly Hills. On March 10, 1995, petitioner's treating physician informed respondent that this position had already been deemed "unsuitable" and that this offer still did not suit her. The agency insisted on offering only jobs specifically precluded from petitioner's job environment.

On March 16, 1995 petitioner filed her civil compliant in U.S. District Court seeking an enforcement of said EEOC orders and not de novo review. Joined were three EEO complaints that had not received a formal hearing, that included a further retaliation claim, sexual hostile work environment and a 1994 non-selection claim of a management vacancy at the Norwalk, CA. Post Office.

As an aggrieved federal employee, petitioner sought enforcement of a favorable EEOC order without risking de novo review on the merits of her claims. The U.S. District and 9th Circuit ignored applicable federal regulations and case law. The

Supreme Court is requested to grant writ of certiorari and make a determination in this matter. Houston v. Nimmo, 670 F.2d 1375, 1378 (9th Cir. 1982); Accord, Girard v. Rubin, 62 F. 3d 1244, 1247 (9th Cir 1995). A district court may not re-determine and must enforce final administrative decisions favorable to the plaintiff if and when requested to do so. Charles v. Dalton, 1996 WL 53633 (N.D. Cal). The seminal case of Moore v. Devine, 780 F. 2d 1559 (11th Cir. 1986) illustrates this point and the rational behind it the best:

> " . . . A federal employee may obtain such relief through his employing agency and the Commission with an enforcement order from the district court if the agency fails to comply. Alternatively, the employee may elect to seek relief from the district court in the same manner as a state or private sector employee, as described in Chandler. [FN3] Our prior decision held that a final agency or EEOC order that is favorable to a federal employee was not a final adjudication and should be re-litigated de novo in the district court. That would require an employee who has successfully invoked an administrative scheme designed to bind agencies to remedy discrimination to prove his or her entire case again in federal court when the agency refuses to take the ordered corrective action. This result would undercut the utility of Administrative dispute resolution provided in the statue and regulations, which gives the employee the option of adjudicating the issue of discrimination in the administrative forum or in the district court". Excerpt from pages 780 F. 2d 1559, at 1562-1563.

The 11th Circuit clearly defines the legal argument, concerning petitions for enforcement of administrative decisions in, Moore v. Devine, 780 F.2d 1559 at 1560, (11th Cir. 1986) on Petition for Rehearing, Clark, Circuit Judge, states: "Upon now being informed about the applicable federal regulations and case law: "we find that they require that the district courts enforce final EEOC decisions favorable to federal employees when requested to do so".

Respondent relied heavily on the case of Chandler v. Roudebush, 425 U.S.840, 96 S. Ct. 1949, 48 L. Ed 2d 416 (1976) and argued that petitioner's civil action was re-viewable only on a de novo basis.

Respondent's reliance on Chandler is misplaced. Chandler is distinguishable and inapplicable in this case on several grounds. First, respondent equivocates the EEOC's January 23, 1995 denial of Appellant's motion for reconsideration with what it apparently perceives as a denial of relief by the administrative process altogether, in turn, resulting in what respondent perceives as a dissatisfied plaintiff. However, although the EEOC's decision of January 23, 1995 amouonted to a denial of petitioner's motion for reconsideration, it nonetheless constituted as affirmance of its March 16, 1994 decision that was **favorable** to petitioner.

This is not a case of an aggrieved and dissatisfied plaintiff who wishes to judicially contest an unfavorable administrative decision. Chandler affords a federal employee the same right to a trial de novo as a private employee, the Fourth Circuit Court of Appeals in the case of Pollard v.Grinstead, 741 F. 2d 73 (4th Cir. 1984), noted that Chandler dealt with a plaintiff who was denied relief at the administrative level. In Pollard, the Fourth Circuit held that the

district court was not required to conduct a trial de novo of an order of an EEOC finding that the federal employee was the victim of discrimination. Chandler truly stands for the proposition that, like a private sector employee, an aggrieved federal sector employee who is denied administrative relief may seek judicial de novo review of an **adverse** administrative decision if she so chooses.

On the other hand, statutory law mandates that where a federal sector employee has received a **favorable** administrative decision, but the employing agency has not complied with the administrative order. The successful complainant may proceed in federal district court to enforce the administrative order pursuant 42 U.S.C. 2000 e-16, section 717 of Title VII and 29 U.S.C. section 505 of the Rehabilitation Act and to seek judicial review of agency refusal to implement the ordered relief pursuant to 29 CFR 1614.503 (g). Administrative Procedure Act, 5 U.S.C. 701 et seq. and the Mandamus Statute, 28 U.S.C. 1361.

Petitioner's 1987, 1994,1995 Reasonable Accommodation Claims were erroneously dismissed in the face of favorable and judicially enforceable EEOC decisions and orders.

ARGUMENT 2

THE NORWALK CALIFORNIA NON-SELECTION CLAIM OF A MANAGEMENT POSITION THAT WAS GIVEN TO A CUSTODIAN INSTEAD OF PETITIONER WHO WAS A MANAGER IS A VIOLATION OF RESPONDENTS OWN POSTED POLICIES AND CONTRARY TO SUPREME COURT CASE LAW

Respondents articulated reasons for not transferring petitioner and not hiring her for the Norwalk job are a pretest for discrimination. Petitioner was deemed qualified for the Beverly Hills position as customer service manager, the same exact job at Norwalk California. The person selected was a younger female who was the custodian and was not a certified manager like petitioner. Respondent claimed that petitioners transfer requests were unreasonable and thus created an undue burden.

Respondent's claim is weakened by the fact that as of May 5, 1993, numerous acceptable vacant positions were available within petitioner' s local commuting area and petitioner was never offered one of them. Petitioner applied for the Norwalk position on her own. The court should take note that during the USPS restructure period, a written management policy was made mandating that no vacant management position was to be awarded to any craft employees, and petitioner was the only manager that applied for the position, and yet the position was awarded to the custodian.

The U.S. District Court and 9th Circuit ignored this fact outright. This violation is contrary to the Supreme Court's ruling in Service v. Dulles, 353 U.S. 363, 372, argued April 23, 1957, decided June 17,

1957, that does hold agencies accountable of written policies.

The 9th Circuit misapplied the Barnett v. U.S. Air Inc., 228 F. 3d 1105, at 1118, (9th Cir. 2000), case because it states that "The EEOC leaves no doubt that reassignment involves more than a mere opportunity for disabled employed employees to compete. Reassignment means that the employee gets the vacant position if he/she is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended". Petitioner was improperly forced to compete for the Norwalk position with other non disabled employees, petitioner did not have to do that if Barnett is true to its holding. Petitioner should have gotten the position and been placed in the vacant customer service management position. Petitioner's brief submitted to the 9th Circuit for Petition for Rehearing clearly pointed out to the court its misapplication of law and the facts of the case that were erroneously over looked. (See supplement appendix)

The recent September 11, 2001 New York incident sparked an important meaning to government written policies. Secretary of Defense, Donald Rumsfeld stated his frustration in getting federal employees who work with classified information to be held accountable to the government policies that mandate that said information not be divulged.

Petitioner requests the Supreme Court to revisit this issue, as the Country looks for conformity in the law.

CONCLUSION

Petitioner respectfully requests that this petition for a writ of certiorari be granted and the two issues presented to the court concerning enforcement of administrative orders and the validity of written agency policies be addressed. Petitioner prays that the Court will reverse the U.S. District Court and 9th Circuit orders and issue an instructive ruling that will make petitioner whole and reinstated, so that justice will be served and case law be uniformly held among the Circuits and by this Court.

Respectfully submitted,

RACHAEL V. SANTOS, Petitioner

Pro Se

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 30, 2001]

No. 99-56904

D.C. No. CV-95-01678 TJH

RACHAEL V. SANTOS, Plaintiff-Appellant

v.

WILLIAM T. HENDERSON, in his Official Capacity as Postmaster General, Chief Executive Officer, United States Postal Service, Defendant-Appellee,

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Before: KOZINSKI and TALLMAN, Circuit Judges,

and WINMILL, Chief District Judge. *

ORDER

Appellants petition for rehearing filed June 25, 2001, is hereby DENIED.

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*The Honorable B. Lynn Winmill, Chief United States District Judge for the District of Idaho, sitting by designation.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 03, 2001]

No. 99-56904

D.C. No. CV-95-01678 TJH

RACHAEL V. SANTOS,
Plaintiff-Appellant,
v.

WILLIAM T. HENDERSON, in his Official Capacity
As Postmaster General, Chief Executive Officer,
United States Postal Service,
Defendant-Appellee,

MEMORANDUM

Appeal from the United States District Court for
the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted March 8, 2001
Pasadena, California

Before: KOZOMSKI and TALLMAN, Circuit
Judges, and WINMILL, Chief District Judge.**

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The Honorable B. Lynn Winmill, Chief United States District Judge for the District of Idaho, sitting by designation.

1. EEOC Rulings

Santos seeks enforcement of administrative decisions that order USPS to reasonably accommodate her. Those decisions, however, did not address the suitability of USPS' offers in 1994 or 1995. Thus, there was no decision to preclude the district court from ordering summary judgment for USPS.

2. **Reasonable Accommodation**

To be entitled to summary judgment on the reasonable accommodation issue, the USPS must, first, have acted in good faith during the interactive process in which the parties are to identify a reasonable accommodation.

Second, USPS must have given due consideration to Santos's preference of accommodations.

Third there must be no genuine dispute that the offered accommodation was actually reasonable. See Barnett v. U.S. Air, Inc., 228 F. 3D 1105, 1114-16 (9th Cir. 2000)(en banc), cert. Granted, No. 00-1250, 2001 WL 119988 (U.S. Apr. 16, 2001).

Even before the 1994 EEOC order, USPS was clearly making a good faith attempt at pursuing the interactive process we described in Barnett. USPS consulted Dr. Fineman's reports to identify specific individuals who posed barriers to the provision of an equal employment opportunity for Santos. USPS identified the specific limitations Santos's disability imposed upon her. USPS also solicited and obtained information about Santos's preferences as to jobs

and locations to identify potential reasonable accommodations.*[1] Finally, USPS offered Santos a position in Beverly Hills as a customer services supervisor, a position which matched the preferences Santos had expressed as to a specific job and as to a specific location. The result was the offer of a position designed to allow Santos to perform in a position that provided her an employment opportunity equal to that of the supervisory position she held before.[2]* The evidence supports a finding that USPS gave due consideration to Santos preference, and that their offer was reasonable. In Barnett, we stated that the employee's preference "shall be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity." 228 F. 3d at 1114 (quoting S. Rep. No. 101-116, at 35 (1989) (emphasis added). Santos never argues that the Beverly Hills position was somehow inferior to the Norwalk position. Santos merely declares the former position "unsuitable" and then argues that USPS discriminated against her by failing To select her for the Norwalk position. There is no evidence to support this conclusion. Here, both positions were supervisory in nature, and USPS made every effort to accommodate appellant's Protean demands.

3. **Retaliation Claim**

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[1] USPS attempted to confer directly with Santos before making a job offer but Santos expressed no interest in such a conference.

[2] If anything, it appears, it appears that Santos may have acted in bad faith during the interactive process. She twice rejected offers to communicate in person with USPS representatives. She failed to provide USPS the names of twenty-three individuals with whom she could not work. Finally, Santos added new or more detailed demands to her list of requirements each time USPS sought to address her concerns.

USPS explains that "Postmaster Dolan sought someone in 1993 who had extensive current experience running a letter carrier unit," experience that appellant did not have. To survive summary judgment, appellant must provide specific, substantial evidence from which a reasonable jury could infer that this reason was pre-textual. Steck v. Motorola, Inc. 703 F. 2d 392 (9th Cir. 1983). As evidence of pretext, Santos asserts that she was as qualified, if not more qualified for the position than the successful candidate. But the successful applicant, at the time USPS selected her, had been serving as acting supervisor for nearly three years in the position, whereas Santos had only eight months of similar experience over eight years earlier. Because appellant has not presented specific, substantial evidence of pretext, summary judgment in favor of USPS is appropriate.

AFFIRMED.

APPENDIX C

United States District Court
Central District of California
Western Division

Filed Oct-7 1999

Entered Oct-8 1999

CV 95-1678 TJH (VAPx)

RACHAEL V. SANTOS,

Plaintiff,

v.

WILLIAM T. HENDERSON,

Defendant,

Order and Judgment

The Court has considered Plaintiff's and Defendant's motions for summary judgment, together with the moving and opposing papers.

It is Ordered that the Plaintiff's motion for summary judgment be, and hereby is, Denied.

It is further Ordered that the Defendant's motion for summary judgment be, and hereby is, Granted.

It is further Ordered, Adjudged and Decreed that judgment be, and hereby is, Entered in favor of Defendant and against Plaintiff.

It is further Ordered, Adjudged and Decreed that Plaintiff shall take nothing and each party shall bear its own costs.
Date: October 6, 1999

Terry J. Hatter, Jr.
Chief United States District Judge